

SERVICE OF PLEADINGS IN CONTESTED MATTERS

**James E. Massey, Judge
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Table of Contents

	Page
Introduction	1
A. Service in Contested Matters Generally.	2
B. The Distinguishing Features of Rule 7004 - Service By Mail and Service Nationwide.	3
C. Service On An Individual.	4
D. Service on An Infant or an Incompetent Person.	4
E. Service On A Domestic or Foreign Corporation, Partnership or Other Unincorporated Association.	4
F. Service On The United States, its Officers and Agencies.	6
G. Service On A State, Municipal Organization or Other Governmental Organization.	7
H. General Rules Applicable to More Than One Type of Entity.	8
I. Service On The Debtor.	10
J. Service On The United States Trustee.	11
K. Service by Publication.	11
L. Service of Process on an Insured Depository Institution.	12
M. Objections To Claims.	12
N. Methods of Service That Are NOT Effective.	13
O. The Certificate of Service.	14
P. Proposed Orders Prepared by Counsel.	15
Q. Conclusion.	15

SERVICE OF PLEADINGS IN CONTESTED MATTERS

Introduction. A bankruptcy case consists of a collection of discrete matters that may be divided into two broad categories. One category consists of routine administrative matters, such as an application to pay a filing fee in installments or an initial motion to extend the time for filing schedules for a short period of time. The relief sought by such motions normally would not adversely affect the rights of third parties.

The other category consists of those matters that are or could be disputed. This category has two subcategories, adversary proceedings and contested matters. Adversary proceedings consist of those types of disputes described in Rule 7001 of the Federal Rules of Bankruptcy Procedure. Contested matters consist of all other disputes in a bankruptcy case. The 1983 Advisory Committee Note to Bankruptcy Rule 9014 states that a contested matter is “an actual dispute, other than an adversary proceeding, before the bankruptcy court.”

[Contested matters] are generally initiated by motion and do not require a responsive pleading (unless the bankruptcy court directs that an answer be served). Only certain of the rules governing adversary proceedings apply to the resolution of contested matters and the court may direct that these rules will not apply in the litigation of a particular contested matter or that other rules will apply. See Fed.R.Bankr.P. 9014. The procedures governing contested matters are thus less formal.

Nantucket Investors II v. California Federal Bank (In re Indian Palms Associates, Ltd.), 61 F.3d 197, 204 (fn. 11) (3rd Cir. 1995).

A motion or objection that seeks to affect the rights of the respondent is a “contested matter,” whether or not the respondent files a response or appears at a hearing to oppose the motion. “It is the existence of an unresolved dispute and a motion seeking relief, rather than formal opposition to the relief sought, that identify a contested matter.” U.S. v. Laughlin (In re Laughlin), 210 B.R. 659, 661 (1st Cir. B.A.P. 1997).

This monograph is concerned with the problem of obtaining in personam jurisdiction over the respondent in a contested matter. Much of what is said here also applies to the service of a summons and complaint in an adversary proceeding.

A. Service in Contested Matters Generally.

Bankruptcy Rule 9014 provides in relevant part:

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004

Rule 9014 goes on to state which of the adversary proceeding rules apply in a contested matter “unless the court otherwise directs.”

Bankruptcy Rule 7004 incorporates some, but not all, parts of Rule 4 of the Federal Rules of Civil Procedure:

Rule 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service pursuant to Rule 4(e)-(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

Fed. R. Civ. P. 4(e)-(j) prescribes the methods for service on individuals found within a federal judicial district (subsection (e)), individuals in a foreign country (subsection (f)), infants and incompetent persons (subsection (g)), corporations and associations (subsection (h)), the United States, and its agencies, corporations, or officers (subsection (i)), and foreign, state, or local governments (subsection (j)). These sections for the most part require personal service. For example, as to individuals, subsection (e) requires service on an “individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the

complaint to an agent authorized by appointment or by law to receive service of process.” Service on a corporation also requires personal service on an officer or agent by delivery to that person.

B. The Distinguishing Features of Rule 7004 - Service By Mail and Service Nationwide.

Rule 7004(b) begins:

Service by first class mail. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e) -(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

Service by mail is a salient departure and less sure method of service than that required under Rule 4 of the Federal Rules of Civil Procedure. A similar striking departure from Rule 4 is the provision in Bankruptcy Rule 7004(d) that “[t]he summons and complaint and all other process except a subpoena may be served anywhere in the United States.”

Courts have held that the privilege of using the less certain method of mail carries with it a greater burden of complying strictly with the provisions of Bankruptcy Rule 7004(b).

With respect to Rule 7004, courts have observed that "nationwide service of process by first class mail is a rare privilege" that can drastically reduce the costs and delay of litigation. In re Pittman Mechanical Contractors, Inc., 180 B.R. 453, 456 (Bankr. E.D. Va.1995) (citing In re Schoon, 153 B.R. 48, 49 (Bankr. N.D. Cal.1993)). As a privilege, however, "it is not to be abused or taken lightly." Id. at 456-57.

An essential requirement of due process is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the action and afford them an opportunity to present their objections.” Mullane v. Central Hanover Bank & Trust, Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). In light of the comparatively lenient procedure in bankruptcy, persons effecting service must provide correct notice in accord with the Rules. In re Pittman at 457 (applying Rule 7004(b)(3) and citing In re Braden, 142 B.R. 317 (Bankr. E.D. Ark.1992) and Schoon). Thus, strict compliance with Rule 7004 serves to protect due process rights as well as to assure bankruptcy matters proceed expeditiously.

In re M & L Business Machine Co., Inc. v. Otis, 190 B.R. 111, 115 (D. Colo.1995).

C. Service On An Individual.

Paragraph (1) of Rule 7004(b) provides for service:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

As Paragraph (1) states, to serve an individual by mail effectively, the envelope containing the summons and complaint, or in a contested matter, a motion, must be addressed to the individual's residence - dwelling house or usual place of abode - or to the individual's regular business address. Note that the Rule 7004(b)(1) does not include a mailing to a post office box.

D. Service on An Infant or an Incompetent Person.

Paragraph (2) of Rule 7004(b) provides for service:

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state. The summons and complaint in that case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

This Paragraph is similar to Paragraph 1 dealing with individuals.

E. Service On A Domestic or Foreign Corporation, Partnership or Other Unincorporated Association.

Paragraph (3) of Rule 7004(b) provides for service:

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

This rule requires that the corporate officer or agent be identified by name. *In re Faulknow*, 2005 WL 102970, *2 (Bankr. N.D.Ga. 2005) (“ . . . Debtors' service of the motion to redeem to the attention of an officer, without specifically naming the individual, fails to comply with Rule 7004 and the constitutional requirements of due process.”). Hence, mailing a motion to “ABC Finance, 125 Peachtree Street, Atlanta, Georgia 30303” or to “President, ABC Finance, etc.” will not constitute good service.

The easiest way to determine the name of an officer is to call the corporation and ask. If the respondent is a creditor with a judgment, one might enlist the help of the lawyer who represented that creditor in the lawsuit. The names of corporate officers may sometimes be found on the Internet. The names of registered agents for service of process may be obtained from the secretary of state in a state where the company is incorporated or has registered to do business, and that information is often available on the Internet. The Georgia Secretary of State maintains an on-line data base of agents for service of process for both Georgia corporations and companies incorporated in another state. The Internet address is www.sos.state.ga.us/corporations/corpsearch.htm.

Not finding the respondent's name in the Secretary of State's database does not relieve the movant and his attorney from obtaining proper service in accordance with Bankruptcy Rule 7004. There are a number of possibilities that might account for not finding a corporate name and registered agent in the Secretary of State's database. Be careful that the name being searched is correctly spelled. If a company does not transact business in the state whose database is being searched, it probably will not be registered with the Secretary of State.

In preparing the motion, pay careful attention to the name of a business entity, and include the full name of the entity in both the motion and the certificate of service. The name of a business will almost always have “Co.,” “Company,” “Incorporated,” “Inc.,” “Corp.,” “Corporation,” or

“LLC” at the end of the name. A common error made by careless attorneys is filing a motion using just a part of a corporation’s name such as “Beneficial.” There are perhaps dozens of corporations with the word “Beneficial” in their names. Serving the wrong “Beneficial,” may well mean that the order or judgment obtained is worthless.

F. Service On The United States, its Officers and Agencies.

Paragraphs (4) and (5) of Rule 7004(b) provide for service:

(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to that officer or agency. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.

These rules mean what they say. A litigant in the Bankruptcy Court cannot effectively sue or seek by motion relief against the Internal Revenue Service by serving only the I.R.S. Current addresses for service in a case in which the United States and the I.R.S. are parties are as follows:

Internal Revenue Service
Insolvency Unit
401 West Peachtree Street
Stop 335-D
Atlanta, Georgia 30308

U.S. Attorney
Northern District of Georgia
Civil Division, Attn: Civil Clerk
600 Richard B. Russell Building
75 Spring Street, S.W.
Atlanta, Georgia 30303

United States Attorney General
Main Justice Building
10th and Constitution Avenue, NW
Washington, D.C. 20530

Department of Justice - Tax Division
Attn.: Chief, Civil Trial Section, Southern
Region
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044

G. Service On A State, Municipal Organization or Other Governmental Organization.

Paragraph (6) of Rule 7004(b) provides for service:

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

Note that the identity of the official to be served under Paragraph (6) is a function of the law of the state in which service is to be made. In Georgia, O.C.G.A. § 9-11-4(5) provides for service:

If against a county, municipality, city, or town, to the chairman of the board of commissioners, president of the council of trustees, mayor or city manager of the city or to an agent authorized by appointment to receive service of process. If against any other public body or organization subject to an action, to the chief executive officer or clerk thereof[.]

Remember that unless waived, the Eleventh Amendment to the U. S. Constitution limits access to federal courts, including the bankruptcy court, when the defendant is a State or State agency. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). But the Eleventh Amendment is not always a bar to jurisdiction over a state. *See, e.g., Tennessee Student Assistance Corp. v. Hood*, ___U.S.___, 124 S.Ct. 1905, 1909 (2004) (holding that “a bankruptcy court's discharge of a student loan debt does not implicate a State's Eleventh Amendment immunity”); *Georgia Dept. of Revenue v. Burke (In re Burke)*, 146 F.3d 1313 (11th Cir. 1998) (state waived defense of sovereign immunity by filing proof of claim with regard to objection to that claim).

Current addresses for Georgia Department of Revenue and the Georgia Attorney General are:

State of Georgia Revenue Commissioner
410 Trinity-Washington Building
Atlanta, Georgia 30334

Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Georgia Department of Revenue
Bankruptcy Insolvency Unit
P.O. Box 3889
Atlanta, Georgia 30334

H. General Rules Applicable to More Than One Type of Entity.

Paragraph (7) of Rule 7004(b) provides for service:

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state.

If service is made on an individual in Georgia, O.C.G.A. § 9-11-4(d)(7) would also permit service on “an agent authorized by appointment or by law to receive service of process.” That feature is contained in paragraph (8) of Rule 7004(b) and is quoted below.

Rule 7004(b)(3) is concerned in part with service on corporations. If the corporation to be served is a Georgia corporation or is a foreign corporation authorized to transact business in this state, service can also be made on “the president or other officer of the corporation, secretary, cashier, managing agent, or other agent thereof, provided that when for any reason service cannot be had in such manner, the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand may be served.” O.C.G.A. § 9-11-4(d)(1). Some lawyers stop reading there and assume incorrectly that serving the Secretary of State is the only action necessary to effect proper service on a corporation not registered with the Secretary of State. But section 4(d)(1) goes on to state that if service is made on the Secretary of State,

the plaintiff or his attorney shall certify in writing to the Secretary of State that he has forwarded by registered mail such process, service, or demand to the last registered office or agent listed on the records of the Secretary of State, that service cannot be effected at such office, and that it therefore appears that the corporation has failed either to maintain a registered office or appoint a registered agent in this state. Further, if it shall appear from such certification that there is a last known address of a known officer of the corporation outside the state, the plaintiff shall, in addition to and after such service upon the Secretary of State, mail or cause to be mailed to the known officer at the address by registered or certified mail

Id. Using the procedure of serving the Secretary of State makes sense only if the party serving the motion or summons and complaint cannot determine the identity of or find a current officer or other agent. And it is effective only if the corporation was required to registered with the Secretary of State but did not. Debtors are as likely to have moved around as the next person. If the debtor did business with a creditor in another state and that creditor does not transact business in Georgia, it

does not take a law professor to figure out that the Georgia Secretary of State will have nothing to do with serving that creditor.

Paragraph (8) of Rule 7004(b) provides for service:

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

I. Service On The Debtor.

Paragraph (9) of Rule 7004(b) provides for service:

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

Debtors (and their counsel) frequently trip up in the Bankruptcy Court because they forget the command of Bankruptcy Rule 4002(5) to “file a statement of any change of the debtor's address.” The debtor’s address for purpose of notice and service of process is the one stated in the petition, unless the debtor files a statement of a change of address. Keep in mind, however, that if a debtor moves and does not notify the Clerk of the change of address and if a plaintiff or movant knows the debtor’s correct address but serves the address stated in the petition, a court might hold that the service was still constitutionally defective because it was not calculated to reach the debtor. Creditors (and their counsel) frequently trip up by serving a represented debtor or that debtor’s lawyer but not both, as this paragraph of Rule 7004(b) requires for effective service on the debtor.

In a joint case, there are two debtors and two separate estates. Each debtor is entitled to separate service. Suppose, for example, a motion or summons and complaint are mailed to:

John Smith
Mary Smith
321 First Street
Anytown, Ga.

“The law presumes that a properly addressed, properly mailed item is received by the addressee.” *In re Keene Corp.*, 188 B.R. 903, 910 (Bankr. S.D.N.Y. 1995). But because in this hypothetical, the envelope is addressed first to John Smith, the presumption that John received it may preclude a presumption that Mary also received it, even if Mary is John’s wife. Each respondent or defendant should be served separately.

J. Service On The United States Trustee.

Paragraph (10) of Rule 7004(b) provides for service:

(10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another place designated by the United States trustee in the district where the case under the Code is pending.

This Paragraph is self-explanatory. The address of the United States Trustee in the Northern District of Georgia is 362 Richard B. Russell Building, 75 Spring Street, Atlanta, GA 30303.

K. Service by Publication.

Bankruptcy Rule 7004(c) provides:

If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule 4(e)-(j) F.R.Civ.P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail, postage prepaid, to the party's last known address, and by at least one publication in such manner and form as the court may direct.

L. Service of Process on an Insured Depository Institution.

The rules for service on corporations set out in Bankruptcy Rule 7004(b)(3) do not apply to depository institutions insured by the F.D.I.C. such as national banks. Bankruptcy Rule 7004(h) provides:

Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless--

- (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
- (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
- (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

Finding out the name of an officer of a bank or other insured institution should not be too difficult. Some credit card issuers, however, are member banks of the F.D.I.C. but have no branch offices. The F.D.I.C. publishes a list of their member institutions on its web site at www.fdic.gov. Here one can find the address of the corporate office, if a local branch office cannot be found. To determine the name of an officer, call the corporate office and ask. The office of the general counsel of a large institution is a likely source of needed information.

M. Objections To Claims.

Official Form No. 10 (proof of claim) contains a block entitled "Name and address where notices should be sent." Is notice directed to the claimant at the address stated on the proof of claim sufficient to give the Court jurisdiction over the claimant with respect to an objection to that claim? Some courts say "yes." *E.g., In re Barker*, 306 B.R. 339, 347 (Bankr. E.D.Cal. 2004) ("The requirement that notice be "mailed or otherwise delivered to the claimant" implicates the address

that the claimant provided on the proof of claim.”). Others say “no.” *E.g., In re Levoy*, 182 B.R. 827, 833-34 (9th Cir. B.A.P. 1995). The safe course is to serve the claimant pursuant to Bankruptcy Rule 7004, as well as at the notice address in the proof of claim. The penalty for being wrong about whether an objection to a proof of claim must be served in the manner specified in Rule 7004 is that the order disallowing that claim will be void.

N. Methods of Service That Are NOT Effective.

Serving a motion in a contested matter on the lawyer who represented a respondent in prior litigation is not effective unless that lawyer is an officer of a corporate respondent or the registered agent for service of process or is otherwise authorized to accept service of process on behalf of the respondent in the bankruptcy case. Bankruptcy Rule 9010(b) provides that “[a]n attorney appearing for a party in a case under the Code shall file a notice of appearance with the attorney's name, office address and telephone number, unless the attorney's appearance is otherwise noted in the record.” But experience shows that notices of appearance may be worded in very different ways. A notice of appearance merely asking for service of notices in the case by the Clerk would hardly prove that the attorney’s client authorized the attorney to accept service of process.

An attorney, solely by reason of his capacity as an attorney, does not thereby become his client's agent authorized by "appointment ... to receive service of process." Nor is the fact that an attorney represents his client in a completely unrelated litigation sufficient to establish the requisite authority. What is necessary is that it appear that the attorney was authorized, either expressly or impliedly, to receive service of process for his client. And if such agency is to be implied, it must be implied from all the circumstances accompanying the attorney's appointment which indicate the extent of authority the client intended to confer.

United States v. Bosurgi, 343 F.Supp. 815, 817-18 (S.D.N.Y.1972) (Footnotes omitted).

An attorney who files a notice of appearance demanding service of pleadings and who actively participates in the case, however, may thereby be deemed to have been authorized by his client to accept service of process. Luedke v. Delta Air Lines, Inc., 159 B.R. 385, 395 (S.D. N.Y. 1993).

If a respondent is a partnership, serving the corporate general partner by mail without naming an officer or registered agent is no more effective than the same service would have been had the corporation been the respondent.

Serving a corporation by serving a Secretary of State but without doing anything else is not effective. Serving an individual by mail at a post office box is not effective.

If the post office returns as undeliverable, mail containing a motion, the red flag should go up and prompt the question of what to do about it. Depending on the facts, the service may or may not have been effective. In any event, however, the party should file with the court a statement stating the facts about the returned mail. Under some circumstances, failure to do so might be viewed as a fraud on the court.

O. The Certificate of Service.

Bankruptcy Local Rule 9014-1 provides:

The person serving process in an adversary proceeding or serving a motion initiating a contested matter with regard to which service on an opposing party is required shall make proof of service thereof promptly to the Bankruptcy Court in accordance with the Bankruptcy Rules. The Certificate of Service must include the name and address of all persons and parties served.

The certificate of service should (1) indicate that the person doing the service is 18 years of age or older, (2) state the date of service, which may or may not be the date of the certificate of service, (3) describe each document served (not simply “the foregoing”) (4) describe the method or methods of service used (in the case of service by mail, it should state that the service was made by First Class U.S. Mail with adequate postage prepaid), and (5) state the name of each person served, the address at which service was made on that person and, if the person served is an agent, the capacity of the agent (officer, registered agent, etc.). The certificate of service should be dated and signed by the person who effected the service, together with that person’s address and telephone

number. If pleadings related to one matter are filed as separate documents (such as a motion and a notice of hearing on that motion), a certificate of service should be attached to each one.

P. Proposed Orders Prepared by Counsel.

Attorneys sometimes submit proposed orders granting unopposed motions stating that the court “finds” that service of the motion was proper. That sort of language is not an insurance policy against bad service. If a party was not served correctly so that the court lacks jurisdiction over that party, a self-serving declaration that service was proper will not make the order bullet-proof. If a motion or summons and complaint are not served properly, the court will lack jurisdiction over the respondent or defendant, and any order entered by default will be void, regardless of what it says about service.

Q. Conclusion.

It behooves the careful lawyer to reread and think about these rules from time to time in order to be thoroughly familiar with them. It is pointless to file a motion that has not been properly served.